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10
11 SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

12 STATE OF ARIZONA,

13 Plaintiff,

14 vs.

15 JAMES ARTHUR RAY,

16 Defendant.

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CASE NO. ~~VCR1300CR201080049~~ **V1300CR201080049**

Hon. Warren R. Darrow

**DEFENDANT JAMES ARTHUR RAY'S
MOTION *IN LIMINE* (NO. 3) TO
EXCLUDE AUTOPSY PHOTOGRAPHS
PURSUANT TO ARIZ. R. EVID. 403**

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 JUL -7 AM 10:24 ✓

JEANNE HICKS, CLERK

BY: **B. Chamberlain**

1 TO THE HONORABLE WARREN R. DARROW AND SHEILA POLK, YAVAPAI COUNTY
2 ATTORNEY:

3 PLEASE TAKE NOTICE that, on July 20, 2010, or as soon thereafter as the matter may
4 be heard in the Superior Court of Arizona in and for the County of Yavapai, Defendant James
5 Arthur Ray, by and through his attorneys of record, will move to exclude photographs taken
6 during the autopsies of James Shore, Kirby Brown and Liz Neuman, pursuant to Arizona Rule
7 Evidence 403. This motion is based on the attached Memorandum of Points and Authorities, the
8 files and records in this case, and any argument and evidence adduced at the hearing on this
9 matter.

10
11 DATED: July 6, 2010

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO

14 THOMAS K. KELLY

15 By:  _____

16 Attorneys for Defendant James Arthur Ray
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The State has theorized that James Shore, Kirby Brown and Liz Neuman died of heat stroke. Because there are no anatomical findings specific for heat stroke, the cause of death that the State will seek to prove *has no characteristics that can be seen* in any of the 70 autopsy photographs taken of Mr. Shore, Ms. Brown or Ms. Neuman. Rather, the only fact illustrated in the photographs is that none of the decedents sustained bodily injury—a fact that is undisputed and irrelevant since the State does not allege that the mechanism of death was violent. Since there is no probative value to these photographs and since their capacity to inflame the jury is obvious, the autopsy photographs should be excluded pursuant to Arizona Rule of Evidence 403.

A. The Autopsy Photographs Are Not Relevant.

To be admissible, “exhibits which may tend to inflame the jury must first be found relevant. The trial court must then consider the probative value of the exhibits and determine whether it outweighs the danger of prejudice.” *State v. Chappelle*, 135 Ariz. 281, 288 (1983) (citing *State v. Beers*, 8 Ariz.App. 534, 538-40 (1968)) and Ariz. R. Evid. 403). *See also State v. Bracy*, 145 Ariz. 520, 533 (1985). “In making this [Rule 403] determination, the trial court must examine the purpose of the offer.” *Chappelle*, 135 Ariz. at 288.

The Arizona Supreme Court has “identified the following uses for which photographs of a corpse may be admitted in a homicide prosecution: to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed.” *Id.* (citing *State v. Thomas*, 110 Ariz. 120, 130 (1973)). In other words, “photographs of a murder victim are relevant if they help to illustrate what occurred.” *State v. Cruz*, 218 Ariz. 149,169 (2008) (citing *State v. Rienhardt*, 190 Ariz. 579, 584 (1997)).

In this prosecution, the autopsy photographs serve none of these purposes and certainly do not illustrate what occurred to Mr. Shore, Ms. Brown, and Ms. Neuman. The

1 photographs illustrate only *what did not occur*—that none of the decedents suffered a physical
2 injury. This fact is neither relevant nor disputed; the State does not allege that the mechanism of
3 death was violent. “If the photographs have no tendency to prove or disprove any question
4 which is actually contested, they have little use or purpose except to inflame and would usually
5 not be admissible.” *Chappelle*, 135 Ariz. at 288 (citing *State v. Steele*, 120 Ariz. 462, 464-66,
6 (1978), *State v. Powers*, 117 Ariz. 220, 223-24 (1977), *State v. Makal*, 104 Ariz. 476, 478,
7 (1969), *People v. Wallach*, 110 Mich.App. 37, 67 (1981)) (emphasis added). *See also Bracy*,
8 145 Ariz. at 533. Such is the case here.

9 Dr. A.L. Mosley and Dr. Robert Lyon, who conducted the autopsies in this case,
10 and Chief Medical Examiner Mark Fischione, have admitted what is well established in forensic
11 pathology: there are no autopsy findings specific for heat stroke. In other words, a medical
12 examiner will not find clinical or anatomical evidence of heat stroke in an autopsy. Transcript of
13 Dr. A.L. Mosley May 21, 2010 Defense Interview at 27:16-19¹; Transcript of Dr. Robert Lyon
14 June 17, 2010 Defense Interview (“Lyon Tr.”) at 12:16-18²; Transcript of Dr. Mark Fischione
15 June 17, 2010 Defense Interview at 26:7-27:8.³ Thus, needless to say, photographs taken during
16 autopsy of a suspected heat stroke victim will reveal nothing about the suspected cause of death.
17 Dr. Lyon confirmed this point in the June 17, 2010 defense interview:

18 [Q]: If I understand correctly then there aren’t any positive
19 autopsy findings that are specific for heat stroke. Is that
right?

20 [A]: Correct.

21 [Q]: So they’re kind of meaningless? The autopsy photos in
22 terms of understanding the cause?

23 [A]: No, they’re helpful.

24 [Q]: In what way?

25 [A]: They’re negative photos I mean they don’t show any injury.

26 ¹ Attached as Exhibit 54 to the Declaration of Truc T. Do in Support of Motion to Change Place
27 of Trial and Motion to Compel Disclosure, filed June 29, 2010 (hereinafter “6/29/10 Do Decl.”).

² Attached as Exhibit 63 to 6/29/10 Do Decl.

28 ³ Attached as Exhibit 62 to 6/29/10 Do Decl.

1 [Q]: Okay, they don't show injury and other than that though
2 there aren't any specific findings that I would see in those
3 photos?

4 [A]: That would confirm heat stroke. Correct.

5 Lyon Tr. at 12:16-13:2.

6 Unlike most homicide cases, there simply is no conceivable theory that the State
7 could proffer to make the autopsy photographs relevant in this case. *See, e.g., Cruz*, 218 Ariz. at
8 168 (autopsy photographs relevant because they supported pathologist's finding of stippling
9 which proved close range of fatal gunshot); *Rienhardt*, 190 Ariz. at 584 (autopsy photographs of
10 victim's head and hand relevant to corroborate witness's testimony that defendant killed victim
11 by shooting him in the hand and then dropping a rock on his head); *State v. Vickers*, 129 Ariz.
12 506, 509-10 (1981) ("photographs [of victim's body] showed the location of wounds and
13 illustrated how the crime was committed" and "aided the jury in determining whether the killing
14 was done during an epileptic seizure" as claimed by defendant); *State v. Thomas*, 110 Ariz. 120,
15 129-30 (1973) (autopsy photographs of gunshot victim's body relevant to demonstrate
16 pathologist's determination of bullet trajectories).

17 **B. Since There Is No Relevance, The Photographs Have No Use or Purpose**
18 **Except to Inflamm The Jury and Rule 403 Requires Their Exclusion.**

19 Where "the photographs in question ha[ve] little probative value on the issues
20 being tried and ... their admission in evidence could have almost no value or result except to
21 inflame the minds of the jury," the Arizona Supreme Court has held that "[u]nder such
22 circumstances, there [i]s nothing for the trial court to weigh, nothing on which its discretion
23 could be exercised, and the admission of [such] photographs w[ould be] error." *Chappelle*, 135
24 Ariz. at 289. Here, the photographs have no probative value on any issue being tried. Instead,
25 their only function, if admitted, will be to shock the jury with the gratuitous horror of a
26 postmortem examination and incite them to render a verdict based on emotion, prejudice, and
27 bias rather than the evidence. This is precisely what Rule 403 does not allow.
28

1 **III. CONCLUSION**

2 For the foregoing reasons, the Court grant Mr. Ray's motion and exclude the
3 introduction of autopsy photographs in this trial.

4
5 DATED: July 6, 2010

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO

THOMAS K. KELLY

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9 By: _____



10 Attorneys for Defendant James Arthur Ray

11
12 Copy of the forgoing personally
13 delivered this ____ day of July, 2010, to:
14 Sheila Polk
15 Yavapai County Attorney
16 255 E. Gurley
17 Prescott, Arizona 86301

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By: _____